AGRI BEEF CO.

IBLA 96-367 Decided March 18, 1999

Appeal from a decision of the Nevada State Office, Bureau of Land Management, denying protest of mineral patent application N-56448. NMC Nos. 91640, 91643.

Set aside and remanded.

1. Administrative Procedure: Standing--Contests and Protests: Generally--Mining Claims: Patent--Rules of Practice: Appeals: Standing to Appeal

   Where an appellant alleges that mineral patent applicants may only access their mining claims via trespass across appellant's private lands and the record is unclear concerning whether there is in fact alternative access, appellant has a "legally recognizable interest" in whether the application proceeds to patent, and thus has standing to pursue an appeal from a denial of his protest pursuant to 43 C.F.R. § 4.410(a).

2. Contests and Protests: Generally--Mining Claims: Determination of Validity--Mining Claims: Patent

   Where legal accessibility to mining claims under patent application is at issue, it is a factor to be considered in determining whether the mineral can be marketed at a profit. The costs of obtaining legal access to mining claims are thus properly the subject of a determination of whether claimants have a valid discovery, and must be evaluated as part of a mineral examination. Where a protestant alleges that patent applicants are trespassing across its private lands to access their claims, such protest is properly held open pending a determination of the validity of the claims.

APPEARANCES: W. Allen Schroeder, Esq., Boise, Idaho, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Agri Beef Company (Agri Beef) has appealed from an April 3, 1996, Decision by the Nevada State Office (NSO), Bureau of Land Management (BLM), denying Agri Beef's June 2, 1994, protest of an application for mineral patent, N-56448, filed by Louis Koncher and Paul Urgel. The patent application encompasses two contiguous lode claims, the RAK and the Calvaras No. 10, located in secs. 28 and 33, T. 44 N., R. 52 E., Mount Diablo Meridian, in the Centennial Mining District, Elko County, Nevada. The claims are located in the Bull Run Mountains south of Mountain City, Nevada, within the Humboldt National Forest, near the summit of Porter Peak.

Agri Beef filed its protest pursuant to 43 C.F.R. § 4.450-2 and 43 C.F.R. § 3872.1, on the basis that applicants do not have access to their claims except through private property owned and controlled by Agri Beef. Agri Beef owns private lands it claims are necessary for access to the lands under patent application, and holds Federal grazing privileges in the nearby Blue Jacket allotment as well. Specifically, the protest Agri Beef filed with BLM alleged:

> The mineral applicant obtains access to such land applied to be patented via private land owned by Protestant and via public land. Such road is commonly referred to as "Blue Jacket Road", and is noted by a pink line on the attached map as Exhibit "B". Such road is not a "public road" under Nevada state law (or under Federal Law). The Protestant objects to and protests the mineral application because the mineral applicant trespasses and will continue to trespass across private land owned by Protestant (i.e., T43N, R52E, sec. 2, c. N ½ N ½, and sec. 35, c. NW 1/4 NW 1/4 NW 1/4) to obtain access to land applied to be patented. Mineral applicant does not have any express, implied, or prescriptive rights of access across Protestant's private land. This results in the mineral applicant not having a "discovery," and thereby no basis to obtain a patent from the United States.

(Protest at 3, 4.) Agri Beef also argued in the protest that, without access to the claim, the patent applicants would be unable to market their product, and therefore, could not satisfy the "marketability" test, one of the elements of proof required to establish a valid discovery of a valuable mineral deposit under laws governing mining on Federal lands.

Koncher filed the mineral patent application on October 5, 1992. By August 1994, the NSO deemed the application ready for Secretarial action issuing a first half final certificate, and forwarded the file to Washington, D.C. In June 1995, however, the Solicitor's office informed the NSO that a first half final certificate could not be issued prior to resolution of Agri Beef's protest. The Solicitor recommended that the

NSO proceed with the mineral examination, as the protest raised questions regarding the validity of the claims, and forwarded the file back to the NSO. (Memorandum of Assistant Solicitor, Branch of Onshore Minerals, Division of Energy and Resources, dated June 9, 1995.)

Subsequently, the NSO referred the application to the United States Forest Service (FS), which has jurisdiction over the Humboldt National Forest, including the applied-for lands. On August 29, 1995, a representative of the FS visited the mining claim site to conduct a preliminary inspection. By letter dated September 8, 1995, the FS advised BLM that access to the claims "can be obtained without crossing private land," without stating how this could be done. In addition, the FS responded that, "[t]he question of access at this site will not be the deciding factor in whether or not the applicant has a discovery." (Letter of Mary Beth Marks to Elaine Lewis.) Reciting this background information in its April 3, 1996, Decision, BLM dismissed Appellant's protest on the basis that it "does not allege a violation of law or regulation in any matter essential to a valid entry as referenced in 43 CFR 3872[;] * * * [nor is it] supported by any acceptable evidentiary information regarding defects in the patent application."

Agri Beef appealed BLM's Decision to this Board, contending that BLM erred in its legal conclusion that, under the mining laws, lack of legal access will not defeat a patent application. On the contrary, Appellant argues, "legal access to the mineral site" is a "condition precedent to a `discovery.'" (Statement of Reasons (SOR) at 3.) Citing an Acting Solicitor's Opinion, "Taking of Sand and Gravel from Public Lands for Federal Aid Highways," 54 I.D. 294 (1933), Appellant argues that a claimant must show he has legal access to a claim as part of establishing that the mineral is marketable. If he cannot show he has a legal access route, according to Appellant, then he has not shown that his claim contains a "valuable mineral deposit." Claiming that BLM erred in its fact finding that "access can be obtained * * * without crossing private lands," Appellant maintains that "no such access currently exists and no application for such access pends." (SOR at 2.) Citing 43 U.S.C. §§ 1761-1771 (1994) pertaining to rights-of-way across public lands, Appellant argues that access across public land is subject to the Federal Land Policy and Management Act of 1976 requirement to obtain a right-of-way, and applicants have not filed for such. (SOR at 2.) Agri Beef charges that applicants have previously engaged in illegal trespass across its private lands, and will continue to do so, as they have refused to enter into an access agreement with Appellant. (SOR at 3.)

BLM has not filed a response to the SOR; however, on May 10, 1996, Mary Beth Marks, FS Geologist, responded via a letter to Elaine Lewis, BLM Land Examiner, stating the following:

> In response to the Notice of Appeal by Agri Beef Co. dated April 26, 1996, the only existing road access crosses the appellant's private land. However, access can be obtained to the

> subject claims without crossing the appellant's private land. A plan of operations (#91643-94) was submitted on October 27, 1994 by Louis Koncher. The major work proposed under this plan of operations is the construction of a new access road. A map showing the location of this proposed access route and the master Title Plat for this area are enclosed. The proposed access road would be located entirely on National Forest System lands. This plan was never approved. Mr. Koncher was encouraged to reach an agreement with Agri Beef Co. so that he could continue to access across their private property. In the interim, the existing access road across Agri Beef Co.'s private property is being researched to determine if it qualifies as a RS2477 road.
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> * * * The question of access has not been resolved and this plan will not be approved until the access question is settled. Our research indicates that this road may have RS2477 status. We are collecting additional documentation prior to completing the official report which will be submitted to the Elko County commissioners. The County will review this report and if acceptable, the road will be identified as a public road.
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> It remains our position that road access does not need to physically exist in order for there to be a discovery and for a mineral examination to be conducted to determine if a discovery exists. Access to a mining claim is a statutory non-discretionary right provided by the United States mining laws. Such access on National Forest system lands must be in accordance with the rules and regulations of the Forest Service (43 CFR 228 A). [1/] Under these regulations the Forest Service has the authority to approve the route and method of access so as to minimize surface disturbance, but it does not have the authority to deny access. The cost of road construction for access will be included in any determination of validity.

(May 10, 1996, Letter of Mary Beth Marks to Elaine Lewis.) 2/

[1] Prior to undertaking analysis of the merits of Appellant's appeal, we focus momentarily on the threshold question of whether Appellant has standing to appeal from BLM's denial of his protest. Appellant rests its appeal of BLM's denial of its protest on the premise that the "[d]ecision in question adversely affects appellant because it dismisses appellant's protest to a mineral application which adversely affects appellant's private land." (SOR at 1.)

1/ The regulation is incorrectly cited in Marks' letter; it is found at 36 C.F.R. § 228.12.

2/ The Marks letter indicates that a copy with enclosures was served on Tyler Shepard, for Agri Beef.

The right to file a protest against action proposed to be taken by BLM extends to "any person"; there is no requirement that the person be adversely affected by the proposal. 43 C.F.R. § 4.450-2. Moreover, any person is free to protest the issuance of a patent on grounds that the patent application fails to comply with the mining law. 30 U.S.C. § 29 (1994); 43 C.F.R. § 3872.1(a); Scott Burnham, 100 IBLA 94, 118, 94 I.D. 429, 442 (1987), aff'd, American Colloid Co. v. Hodel and Burnham, No. C88-224K, (D. Wyo. Dec. 22, 1988). See also Scott Burnham (On Reconsideration), 102 IBLA 363 (1988). A patent application may be protested any time prior to issuance of patent. Id.

Although Agri Beef was not prohibited from filing a protest, it does not follow that the dismissal of that protest is automatically subject to appeal, as, under 43 C.F.R. § 4.410, the right of an appeal to the Board is extended only to those parties to a case who can show that they are "adversely affected." In order to be adversely affected, a protestant must have an "interest" in the land which is the subject of the protested action. The "interest" necessary for standing to appeal is not the same as the "interest" necessary to bring a contest. A contest requires "title to or an interest in land," which generally must be grounded on a statutory grant. In contrast, the interest necessary to appeal denial of a protest is neither limited to legal interests in the specific land at issue, nor to economic or property rights. It must be a legally recognizable interest, but ownership of adjoining land or past usage of the land in dispute have been recognized as giving sufficient interest. See Melvin Helit, 110 IBLA 144, 149, n.5 (1989); Scott Burnam, 100 IBLA at 119-20, 94 I.D. at 443 and cases cited. See also In Re Pacific Coast Molybdenum, 68 IBLA 325 (1982).

In this case, Appellant is neither an adjoining owner, nor does Agri Business allege prior use of the lands subject to patent. However, it is clear from the record that Appellant has a "legally recognizable interest" in whether the application proceeds to patent, as Appellant claims "the mineral applicant trespasses and will continue to trespass" across its private lands. 3/ We hold, therefore, that Appellant has established that

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3/ As we noted in In re Pacific Coast Molybdenum, supra at 333-34, "it is certainly arguable that the real injury of which appellants complain is unrelated to the patent proceeding, since its cause is the mining of the deposit which could be accomplished in the absence of any patent application. It could be further contended that, in order to be consistent, the Board must either permit protests in the absence of a patent application or deny them when a patent application is involved since in both circumstances it is the actual mining and not the patent proceedings which cause the alleged injury.

"While there is a certain logic to the above argument, it ignores the fact that absent a patent application there is no `action' by BLM which can be subject to a protest under 43 CFR 4.450-2. A mining claim is located and operated solely by the claimant without any affirmative action by BLM whatsoever. Nor does the location or mining of a claim in anyway initiate a `proceeding' before BLM. A patent, however, can only be granted in furtherance of the Department's expressed duty to recognize valid claims, under procedures duly established by statute and regulation.

it is a party to the case and has alleged interests which were adversely affected by the denial of its protest within the meaning of 43 C.F.R. § 4.410, and, thus, can maintain the instant appeal.

[2] Departmental regulation 43 C.F.R. § 3872.1(a), governing the protest of mineral patent applications, provides, in pertinent part: "At any time prior to the issuance of patent, protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings." This language is in turn based upon language in the 1872 mining law, 30 U.S.C. § 29 (1994). BLM found that Appellant's challenge to the patent application does not "tend to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings," and thus dismissed Appellant's protest. Agri Beef claims that its challenge is based on legal authority which indicates that proof of accessibility is integral to showing that the mineral can be marketed at a profit.

Specifically, Agri Beef relies upon specific language in the "marketability rule" which indicates that "it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date." (Emphasis supplied.) See, e.g., Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Clark J. Guild, 34 IBLA 387, 398 (1978); United States v. J.L. Block, 12 IBLA 393, 401 (1973); United States v. Humboldt Placer Mining Co., 8 IBLA 407 (1972); Acting Solicitor's Opinion, "Taking of Sand and Gravel From Public Lands for Federal Aid Highways," supra at 296. While this language originated from Departmental decisions pertaining to placer discoveries for common varieties of sand and gravel, which were withdrawn from location under the mining laws on July 23, 1955, (see 30 U.S.C. § 611 (1994)), the United States Supreme Court ruling in United States v. Coleman, 390 U.S. 599 (1968), grafted the "marketability rule" onto the "prudent man rule," set forth in Castle v. Womble, 19 L.D. 455, 457 (1894), approved by the Supreme Court on numerous occasions. Chrisman v. Miller, 197 U.S. 313, 322 (1905); Cameron v. United States, 252 U.S. 450, 459 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-36 (1963). Thus, we must agree with Agri Beef that, where accessibility to the claim is a point of contention, it is a factor to be considered in determining whether the mineral can be marketed at a profit. We therefore hold that BLM erred in its decision finding that "this protest does not allege a violation of law or regulation in any matter essential to a valid entry * * *," as the protestant alleges a defect relating to the capacity of claimant to profitably market the mineral.

However, unless Appellant has alleged facts to support his theory, BLM's decision denying the protest would still be justified. We therefore

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fn. 3 (continued)
Such recognition is clearly `action proposed to be taken in a proceeding before the Bureau,' and, as such, is properly the subject of a protest and, where an adverse interest is shown, appeal."

turn to the question of whether the record supports BLM's determination that access can be obtained without crossing private lands held by Agri Beef.

The patent application filed in October 1992 contained, inter alia, location notices, a narrative by Louis Koncher regarding development of the claims, and an independent mineral examination of the RAK claim conducted by mining engineer Vernon T. Dow in 1961. These documents reveal that the RAK claim was located in July 1954. That and other contiguous claims were located and worked through the late 1950's and 1960's. In 1972, the Calaveras No. 10 was located. Dow's report notes that "elevations on the [RAK] claim range from 8,400 to 9,000 feet above sea level, and is very rugged, * * * characterized by 40 degree slopes and vertical cliffs." It is generally assumed that mineralization was discovered on Porter Peak before the turn of the twentieth century, but prospects were abandoned due to high elevation and rugged terrain, which thwarted access to the location. Dow reported that, in 1961, it was possible to reach the RAK claim "from Mountain City by driving north 13 miles on paved State Highway 11A to the Indian town of Owyhee, then south 22 miles on graveled State Highway 11 to the Mouth of White Rock Canyon, then 5 miles up White Rock Canyon on a jeep trail to the property." (Patent Application, Dow Mineral Examination attached to Ex. C at C-2.)

According to consulting geologist Donald G. Strachan, who prepared an evaluation of the economic geology of the Rak and Calaveras #10 claims in September 1993, access to the claims is currently obtained by travelling north from Elko, or south from Mountain City. Travelling from Elko, "[t]he first 66 miles to Bull Run Creek is paved, followed by six miles of county gravel road and four miles of well-graded but non-maintained dirt road." According to Strachan, "Mountain City is 24 road miles northeast of the * * * mine. The first five miles south from Mountain City is paved, followed by 15 miles of county graded road, and the four miles of well-graded but non-maintained mine access road." 4/

The FS has been involved with the question of access to the claims since the protest was filed. On May 26, 1994, Jack M. Carlson, FS District

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4/ Between 1977 and 1984, according to Koncher, road improvements were made to ease access to the lower tunnel of the RAK claim. In 1977 and 1978, a road was surveyed "to be built to [the] lower tunnel of the RAK claim, with help from the Forest Service." (Patent Application, Ex. C.) In September 1980, Koncher and Urgel leased and optioned the claims to Erg, Inc. (Erg). According to Koncher, Erg built 3-1/2 miles of Class D road to the "lower tunnel at a cost of nearly $20,000." Erg spent a total of $147,000 on the claim, "went broke," and Koncher received the property back. Koncher avers that in 1984, he "repaired the road to the tunnel at a cost of $1800." The road in question, Blue Jacket Road, however, is not in near proximity to the claims, but lies some distance below the summit in the valley, near the ghost mining town of Aura. We presume that the "well-graded by non-maintained dirt road" to which Strachan refers is road improved by Erg and maintained by Koncher, and that the "county road" to which Strachan refers contains the disputed access area.

Ranger for the Mountain City Ranger District informed Koncher's attorney, Stewart Wilson, that "Louis Koncher is working with the USDA Forest Service to permit a road around the Agri-Beef land." On July 18, 1995, Elaine Lewis, BLM Land Examiner, in a memorandum to BLM's file, stated that she called "Dean Morgan at USFS in Elko inquiring about the status of the access to the claims." At that time, according to the Lewis memorandum, Dean Morgan was working with Koncher to find another access route to the claims:

> Dean stated that the FS and the county commissioners were trying to resolve the issue by opening a particular road up for public use which * * * cross[es] private land of Agri Beef * * *. This would create another access for Mr. Koncher to get to his claims. * * * At present the situation is still pending and nothing is resolved.

(Memorandum of Elaine Lewis to the file, dated July 18, 1995.) And finally, in her May 1996 reply to this appeal, Mary Beth Marks reported that, assuming applicants and Appellant cannot negotiate an access agreement, the applicants will ultimately obtain access either through a county determination that the road has "RS 2477 status," or access will be provided through FS lands in accordance with applicable regulations. Marks argues that since access cannot be denied if there is a valid discovery, access is not an impediment for applicants.

There is no question that reasonable access to a valid mining claim cannot be denied. 36 C.F.R. § 228.12; see United States v. James and Marjorie Collard, 128 IBLA 266, 291 (1994). However, the record in this case does not support a finding that applicants can gain reasonable access to their claims without crossing Appellant's private lands. Moreover, the Board has long held that, in determining the validity of a discovery for patent, the costs of compliance with all applicable Federal and State laws, including environmental laws, are properly considered in determining whether or not the mineral deposit is presently marketable at a profit, i.e., whether the mineral deposit can be deemed to be a valuable mineral deposit within the meaning of the mining laws. See, e.g., Great Basin Mine Watch, 146 IBLA 248, 256 (1998), citing United States v. Pittsburgh Pacific Co., 30 IBLA 388, 405, 84 I.D. 282, 290 (1977), aff'd sub nom. South Dakota v. Andrus, 614 F.2d 1190 (8th Cir.), cert. denied 449 U.S. 822 (1980); and United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 298-99, 80 I.D. 538, 546-47 (1973).

Whether the patent applicants gain access to their claims through FS lands, private (Agri Beef) lands, or county lands, applicants will be responsible for costs associated with the creation and/or purchase of reasonable access. These costs are properly the subject of a determination of whether claimants have a valid discovery, and must be evaluated as part of a mineral examination. It follows, therefore, that Appellant's protest cannot be resolved until the mineral examination has been completed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R § 4.1, the Decision

appealed from is set aside and remanded, with instructions to BLM to proceed with the mineral examination, taking into account resolution of the access question. The protest should be held open pending a determination of whether applicants have a valid discovery for purposes of obtaining patent to their claims, and Appellant shall have a right of appeal from BLM's decision on the protest rendered thereafter.

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James P. Terry
Administrative Judge

I concur:

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John H. Kelly
Administrative Judge